

August 5, 2020

VIA CM/ECF

The Honorable John G. Koeltl
United States District Judge
Southern District of New York
Daniel Patrick Moynihan U.S. Courthouse
500 Pearl Street
New York, NY 10007-1312

RE: Notice of Subsequent Authority in *State of New York, et al. v. U.S. Department of Education, et al.*, No. 1:20-cv-4260-JGK (S.D.N.Y.)

Dear Judge Koeltl:

As supplemental authority in further support of their pending Motion for Preliminary Injunction in the above-referenced case, Plaintiffs the State of New York and the Board of Education for the City School District of the City of New York (“Plaintiffs”) respectfully notify the Court of a Second Circuit decision, issued yesterday, in *New York v. U.S. Department of Homeland Security*, --- F.3d ---, 2020 WL 4457951 (2d Cir. Aug. 4, 2020).

In this Administrative Procedure Act challenge to the Department of Homeland Security’s “public charge” rule, the Second Circuit affirmed, with modification, two district court decisions preliminarily enjoining DHS’s implementation of that rule and staying its effective date under 5 U.S.C. § 705. *Id.* at *7-8, *32.¹ The Second Circuit recognized that injuries asserted by the State of New York and the other state plaintiffs, which included “be[ing] required to undertake costly revisions to their eligibility systems to ensure that non-citizens are not automatically made eligible for or enrolled in benefits they may no longer wish to receive after the [Public Charge] Rule’s implementation,” were irreparable harm. *Id.* at *30. Likewise, the Second Circuit held that injuries claimed by the organizational plaintiffs, including diverting resources to conduct workshops to train community members about the Rule, hiring “two part-time staff members,” reassigning staff to new responsibilities, and conducting other outreach to counteract the Rule’s effects, were irreparable harm. *Id.* at *30; *10-11. Because these injuries were “actual and imminent,” and because “money damages are prohibited in APA actions, they are irreparable.” *Id.* at *30.

The *New York* decision further supports Plaintiffs’ position that they have already suffered, and will continue to suffer, irreparable harm in implementing and complying with the U.S. Department of Education’s Final Rule, Nondiscrimination on the Basis of Sex in Education Programs or Activities Receiving Federal Financial Assistance, 85 Fed. Reg. 30,026 (May 19, 2020) (“Final Rule”), in amending policies, procedures, and publications; conducting trainings;

¹ The decisions below were *New York v. U.S. Department of Homeland Security*, 408 F. Supp.3d 334 (S.D.N.Y. 2019), and *Make the Road New York v. Cuccinelli*, 419 F. Supp. 3d 647 (S.D.N.Y. 2019).

and hiring new staff. Pls.' Mem. of Law in Support of Mot. for Prelim. Inj. ("Pls' Mem.") at 11-13 [ECF No. 19]; Pls.' Reply Br. at 1-3 [ECF No. 65]. These are the precise types of administrative harms and compliance costs the Second Circuit found to be irreparable harm. *New York*, 2020 WL 4457951, at *30. Like the other irreparable harms Plaintiffs have asserted, Pls.' Mem. at 13-16, Reply Br. at 3, Plaintiffs have suffered and will continue to suffer these injuries after the August 14, 2020 effective date if the Rule takes effect then.

Respectfully submitted,

LETITIA JAMES

Attorney General of the State of New York

By: /s/ Joseph Wardenski

Joseph Wardenski, *Senior Trial Counsel*

Matthew Colangelo

Chief Counsel for Federal Initiatives

Morenike Fajana, *Special Counsel*

Lindsay McKenzie, *Assistant Attorney General*

Office of the New York State Attorney General

28 Liberty Street

New York, NY 10005

Phone: (212) 416-8441

Fax: (212) 416-6007

Joseph.Wardenski@ag.ny.gov

Attorneys for the State of New York

JAMES E. JOHNSON

Corporation Counsel of the City of New York

By: /s/ Sabita Krishnan

Sabita Krishnan

Joseph Pepe

Tonya Jenerette

Assistant Corporation Counsel

100 Church Street

New York, New York 10007

(212) 356-2273

skrishna@law.nyc.gov

*Attorneys for the Board of Education of the City
School District of the City of New York*